88-1065 (1)

Supreme Court, U.S.
FILED
DEC 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

JAMES T. PATTERSON, SR.

petitioner

vs

ATLANTA BAR ASSOCIATION, ET AL,
respondents

ON WRIT OF CERTIORARI TO
SUPREME COURT OF GEORGIA

PETITION FOR CERTIORARI

James T. Patterson, Sr.
329 Plantation Circle
Riverdale, GA 30296
(404) 996-6410
petitioner

69pp

PETITION FOR CERTIORARI

A. QUESTIONS PRESENTED FOR REVIEW:

1. Do attorneys, licensed to practice in Georgia, have a duty to provide expert witness services in civil actions and, if so, would a refusal to provide such service, that did cause damage, create a cause of action under the tort statutes?

2. Is Georgia Statute 9-11-9.1 requires that a legal expert affidavit accompany the filing of a legal malpractice action, constitutional in the absence of guarantee that legal expert testimony will be available to all litigants who have a meritorious cause of action?

3. Is it a violation of federal civil rights statutes for two or more persons to conspire to prevent a witness from testifying in a legal malpractice action?

4. Is it constitutional to issue an order restraining plaintiffs from filing any action against defendants without obtain-

ing permission of the court, as to any cause of action that could arise?

5. Is it proper for the Trial Court to rule upon a motion to disqualify itself?

6. Is it proper at summary judgment for the Trial Court to resolve issues of fact, to construe evidence in favor of moving parties, to draw inferences in favor of moving parties, or to resolve questions as to credibility of evidence?

B. LIST OF PARTIES

Plaintiffs - James T. Patterson, Sr.; Southway Theatres Inc.(Not Petitioner)

Defendants - Atlanta Bar Association; Carl A. Adcock; Cobb Bar Assn, David H. Flint; Charles H. Hyatt; Taylor W. Jones; William C. Lanham; Daniel I. McIntyre; James T. McDonald, Jr.; Charley G. Morris; Samuel S. Olens; J. Boyd Page; Jeffrey M. Smith; Richard E. Stark; State Bar of Georgia; Warren O. Wheeler.

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D. REFERENCE TO OFFICIAL REPORTS

Patterson v. Lanham (March 17, 1987)

182 Ga. App. 343, 355 SE 2d 738.

Patterson v. Flint (April 8, 1987)

182 Ga. App. 650, 356 SE 2d 670.

E. GROUNDS ON WHICH JURISDICTION INVOKED

1) Fulton Superior Court Judgments

Dated March 30, 1988 and June 24, 1988

2) Georgia Supreme Court Judgment

Dated October 26, 1988

4) Sections 1254, 1257, 2104 and 2106 of Title 28 of the U.S. Code authorizes the Supreme Court to review judgments of State Courts when State Courts have decided Federal question(s) that conflict with other state courts of last resort or conflict with decisions of Federal Court of Appeals or conflict with decisions of the U. S. Supreme Court or where validity of a state statute is drawn in question on the ground of its being repugnant to the U.S. Constitution or laws of the United States or where any privilege is specially claimed under the Constitution or statutes of the U.S.

F. CONSTITUTIONAL PROVISIONS & STATUTES

1) U. S. Constitution Amend. V, in part: "No person shall be...deprived of life, liberty, or property, without due process of law..."

2) U. S. Constitution Amend. VII in part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,..."

3) U. S. Constitution Amend XIV, in part:
"No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4) 28 U.S.C.A. Sec 1654 in part:
"In all courts of the United States the parties may plead and conduct their own cases personally."

5) Ga. Constitution Art 1, Sec 2, Par 5:
"Legislative acts in violation of this constitution or the Constitution of the United States are void, and the judiciary shall so declare them."

6) Ga. Constitution Art 1, Sec 1, Par 10:
"No bill of attainer, ex post facto law, retroactive law or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed."

7) Ga. Constitution Art 1, Sec 1, Par 7:
"All citizens of the United States, resident in this state, are hereby declared citizens of this state; and it shall be the duty of the General Assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges, and immunities due to such citizenship."

8) Ga. Constitution Art 1, Sec 1, Par 12:
"No person shall be deprived of the right to prosecute or defend, either

in person or by an attorney, that person's own cause in any of the courts in this state."

9) O.C.G.A. 9-11-9.1 in part:
"Complaint in any professional malpractice case must be accompanied by an affidavit of 'an expert competent to testify' which sets forth 'at least one negligent act or omission and the factual basis for such claim'."

10) O.C.G.A. 15-19-4(6) part:
"It is the duty of attorneys at law never to reject, for a consideration personal to themselves, the cause of the defenseless or oppressed."

G. STATEMENT OF THE CASE

In August 1975 Plaintiff-Petitioner Patterson accepted the litigation recommendation of attorneys Warren Wheeler and David Flint by authorizing Wheeler and Flint to file a Federal antitrust action against their former clients, the major motion picture film distributors, and three theatre circuits. Wheeler and Flint stated that the trial should come within three years and that the $5,000.00 retainer should be adequate to cover fees and costs to get to trial. Attorneys for

the motion picture distributors initially objected to Wheeler and Flint's prosecution of the case on grounds of conflict of interest, but then suddenly withdrew their objection. During the years that followed Wheeler and Flint granted and sought dozens of extensions and Wheeler and Flint refused Patterson's instruction to move for sanctions when it was discovered that the major film distributors had concealed and withheld from production highly incriminating documents.

The pretrial order in that action was not entered until February 1984. The pretrial conference was scheduled for April 2, 1984. On March 12, 1984 Wheeler and Flint demanded, on threat of withdrawal, that Southway execute a highly restrictive open ended second mortgage note against its theatre property in favor of Wheeler and Flint to guarantee

payment of outstanding and future billings. Southway had already paid Wheeler and Flint more than $60,000.00. Wheeler and Flint's prosecution agreement called for $25/hr fees plus 25% of any recovery. It did not call for any notes or other guarantees. Consistently since 1980 Southway's account had not been kept current. They had never demanded that Southway bring the account into a current status. When Patterson declined to comply with their demand regarding the 2nd mortgage note, they withdrew. Patterson could locate no attorney willing to step into the nine-year old antitrust case. As a result the action was dismissed for want of prosecution. In January 1981 Wheeler and Flint filed a 2nd "Southway" suit to preserve damages for another four-year period. That suit too was dismissed for want of prosecution.

Patterson became president of the

Independent Theatre Owners Association in 1975. In 1977 two programs of the Assn. came under attack from major film distributors, a screen-ad program and a distribution program involving the "Buddy Holly Story". Patterson consulted with attorney Stanley Sacks of Norfolk, VA and attorneys Cullen Ward and William Lanham of Atlanta. These attorneys recommended two suits in Federal court and agreed to prosecute same for a 1/3rd contingency fee provided Plaintiffs pay the costs. Patterson and the Assn. authorized the actions. Ward and Lanham filed the Buddy Holly suit in December 1978. Ward passed away not long thereafter. Lanham filed the Screen-ad suit in March 1980. When the court in the Buddy Holly suit refused to permit an amendment to add parties, Lanham filed a 2nd suit against other parties. The first suit came to trial in

August 1982. The verdicts went against Patterson and the Association.

Immediately thereafter Lanham and Sacks demanded Patterson change the prosecution agreement from the 1/3 contingency to $100 per hour. When Patterson refused, Lanham and Sacks announced they were doing no more work on the cases. At that time Patterson had already paid out more than $50,000 for depositions, etc. Patterson, faced with a 30 day appeal deadline on the first Buddy Holly suit, frantically searched for a replacement attorney. The only competent attorneys interested wanted $25,000 just to come up to speed in the cases. Finally Patterson located Lawrence Aiken, a sole practitioner who agreed to take the cases. During the next several months Aiken did very little, and thereafter simply abandoned the cases. As a result the screen-ad case was dismissed for want of prosecu-

tion and the 2nd Buddy Holly suit was dismissed on collateral estoppel and res judicata. Aiken refused to prepare for hearings and provide adequate responses to the motions of the defendants.

In April 1985 Patterson complained to the Ga. Bar. The Ga. Bar did nothing. In July 1985 Patterson, proceeding pro se, filed a large suit in Federal court against the defendants in the 5 actions, his attorneys, the judges, the attorneys who concealed and withheld documents and the Ga. Bar. The complaint contained Federal counts and malpractice counts against Aiken, Lanham, Wheeler and Flint. The Federal court dismissed the action, holding the Federal counts were frivolous, and declined jurisdiction of the state related malpractice counts. The Federal court imposed Rule 11 sanctions respecting one of the Federal counts.

Patterson took the jurisdictional ruling to mean the malpractice counts should be pursued in state court. Accordingly, he filed malpractice complaints against Wheeler and Flint in Fulton Superior Court and against Lanham and Aiken in Fayette Superior Court. Lanham, Wheeler and Flint responded by filing summary judgment motions based on their own expert affidavits that they had done no wrong. Patterson began a search for an attorney to serve as his legal expert to offset denials of defendant attorneys. Patterson contacted more than a dozen attorneys individually, the Cobb Bar Assn., the Decatur-Dekalb Bar Assn., the Atlanta Bar Assn., the South Fulton Bar Assn. and the State Bar of Georgia, requesting an attorney to serve as an expert witness.

Five of the parties contacted initially agreed to provide the service, but

did later mysteriously breach those agreements. The Cobb and Decatur-Dekalb Bar stated they had no lawyers who would testify against other lawyers. The State Bar declined to recommend anyone, but did suggest Patterson contact the Atlanta Bar lawyer referral service. Patterson contacted them. Later Patterson was told by them many attorneys had been contacted but everyone had declined stating that they knew about the litigation.

Patterson a) continued to look for an attorney expert b) filed his own affidavit and statement of disputed material facts and c) moved the courts, pursuant to O.C.G.A. 9-11-56(f), to deny summary judgment due to his inability to obtain the affidavit of an attorney expert. Both the Fulton and Fayette Superior courts entered summary judgment against Patterson on the grounds that no count-

ering affidavit of an expert was presented. The Georgia Court of Appeals upheld those rulings on the same grounds. (see cases under section "d" hereof).

In December 1987 Patterson filed the action herein appealed. Defendants named were Atlanta Bar, Cobb Bar, State of Ga. and thirteen attorneys. The Ga. State Bar was added and State of Ga. was dismissed. Petitioner charged defendants with violations of duty; violations of his civil rights; fraud for pretending to represent Petitioner when Wheeler and Flint were still working for their former clients, the major film distributors; breaches of contracts; interference with his efforts to obtain an expert; boycott and conspiracy. Patterson charged also that a new state law requiring expert witness affidavits with the filing of malpractice actions is unconstitutional. When assigned to the judge who dismissed one of

the malpractice actions, Patterson moved to disqualify that judge on grounds he witnessed some of the boycott events and prejudged one of the primary cases without benefit of the record in that case.

Defendants moved for summary judgment on collateral estoppel, res judicata, no evidence of breach of agreements or breach of duty, no proof of fraud or interference or conspiracy. Throughout this action and the prior malpractice actions the defendants have engaged in repeated distortions seeking to brand Patterson as being litigious. Defendants went so far as to move for a restraining order to prevent him from filing future suits against any of the defendants without obtaining permission from the court.

Patterson countered the motion for summary judgment by arguing that no basis for collateral estoppel and res judicata

had been entered into the record, the summary judgment motions were not timely filed, attorneys have a duty to accept employment as experts, the law requiring expert affidavits be filed with malpractice actions is unconstitutional, there were five breaches of agreement, there was substantial evidence of interference and a conspiracy to boycott, and there were 54 issues of material facts.

The trial court on March 30, 1988 declined to disqualify itself and on June 24, 1988 entered summary judgment in favor of the defendants holding a) that the Ga. Law requiring an expert affidavit with malpractice suits is constitutional, b) collateral estoppel and res judicata did apply, c) lawyers have no duty to supply expert services in civil actions, d) there was no conspiracy or boycott, e) there were no breaches of agreement, and f) there were no issues of fact for reso-

lution by a jury. The trial court also issued a restraining order that Plaintiff file no suit in any court against defendants without obtaining court permission.

The Trial Court Order is filled with inaccuracies. For instance, it stated Patterson refused to proceed pro se after his lawyers had abandoned him. Not so. Patterson sought to proceed pro se but was not allowed to do so by the Federal Courts. It stated none of the lawyers Patterson contacted agreed to provide expert service. Not so. Several agreed and then later mysteriously reneged. It stated that Patterson was involved in actions against Troup County Board of Ed. Not so. The person involved was James E. Patterson, not James T. It stated Patterson's lawyers withdrew because Patterson tried to control the litigation. Not so. Flint and Wheeler withdrew when he

would not give them a second mortgage on the theatre property. Lanham withdrew when he would not change the prosecution agreement. Virtually every paragraph of the order contains at least one factual inaccuracy. The Trial Court's Order reads like an advocate's brief rather than an impartial opinion.

Patterson appealed to the Supreme Court of Ga. who on October 26, 1988 did affirm the trial court without opinion. Notice of appeal to the Supreme Court of the U. S. was filed on November 4, 1988.

H. WHERE FEDERAL QUESTIONS FIRST RAISED

1. The Complaint at paragraph 23 and Counts III & IV thereof charge violation of 42 USC 1985 in respect to conspiracy to deter witnesses from testifying.

2. The Complaint at par. 24 and Count VI charge violation of 18 USC 1654 and U.S. Constitution Amendment 14 in respect to preventing plaintiffs from prosecuting

their complaints and from testifying against the perpetrators thereof.

3. The Appeal Brief to the GA Supreme Court at enumeration of errors "g" charges 9-11-9.1 is unconstitutional.

4. The Appeal Brief to the Georgia Supreme Court at enumeration of errors "h" charges that 42 USC 1985 was violated by deterring witnesses.

5. The Appeal Brief to the Ga. Supreme Court at enumeration of errors "i" charges the restraining order prohibiting Plaintiffs from filing future actions against these defendants is unconstitutional.

J. ARGUMENT

Appellants entered the arena of litigation through the customary means; by consulting with lawyers who recommended and did thereafter upon authorization file suit. Prosecution agreements were made with the lawyers, pursuant to

which Appellants paid out more than $100,000 and did invest also more than 10,000 hours of Patterson's time. Lanham, Wheeler, and Flint filed five actions and prosecuted same over a nine year period (2 of the 5 were duplicate damage extending suits). Lanham in 1982 and Wheeler and Flint in 1984 each demanded changes in the prosecution agreements. When Appellant refused their demands, they withdrew, which led to dismissal of 4 of the actions (the 5th was tried in Aug. 1982). Unable to find attorneys willing to step into aged antitrust actions, Patterson moved the Federal courts to permit him to proceed pro se. The motions were denied.

In effect, once Patterson had hired lawyers his civil rights in respect to those suits came to an end. The fate of his complaints was totally in the hands of the lawyers. When those lawyers tired of the actions they quit; and in so doing

terminated Appellants' rights to legal recourse. Not only did Appellants suffer the loss of their basic complaints but they did also lose more than $100,000 and 10,000 hours in paralegal type work.

In theory, the lawyers should have been responsible for the losses! In theory, when the lawyers made prosecution agreements they undertook to prosecute the actions to just resolutions! In theory Appellants' remedy should have been through suits for breach of contract and/or malpractice! Believing that the system is honorable and supposed to work, Appellant, after an aborted action in Federal court, proceeded for breach of contract and malpractice against Lanham in Fayette Superior Court and against Wheeler & Flint in Fulton Superior Court.

It was at that point Patterson's second class citizenship became apparent.

Lanham, Wheeler and Flint filed highly generalized affidavits as legal experts stating they had done no wrong. In seeking to obtain countering affidavits from attorneys Patterson had five parties mysteriously breach agreements with him to provide affidavits and he encountered what amounted to a boycott by the lawyers of the area. Unable to find a lawyer who would provide an affidavit Patterson submitted his own affidavit showing with evidence, breaches of contract and violations of the attorneys' code of conduct. Both trial courts, in response to defendants' summary judgment motions, ignored the breach of contract claims and ignored Patterson's affidavit that set forth the lawyers' breaches of duty and enterd summary judgment against Patterson. The trial courts took the position lawyers could be their own experts and that the only way that Patterson could raise an

issue of fact necessary to survive summary judgment both with respect to malpractice and breach of contract would be to present a countering affidavit from another lawyer. The premise of the rulings was that only lawyers can recognize breaches of contract and misconduct in other lawyers. Ga. courts adopted the position that a breach of contract by a lawyer toward his client amounted to malpractice, which required another lawyer to express an opinion thereupon. That posiion constituted a device that deprived Patterson from testifying as to breach of contract by his lawyers.

During that period of time the lawyer-studded Legislature of Georgia enacted a law requiring affidavits of experts accompany the filing of legal malpractice complaints. The law, OCGA 9-11-9.1, precluded Patterson from proceeding on mal-

practice grounds against the lawyers who had agreed to supply expert witness testimony. Patterson's only recourse was to file this action, which charges breach of contract, breach of duty, interference with efforts to obtain an expert, boycott, conspiracy and unconstitutionality of the above referenced statute.

The gravamen of this appeal rests upon Patterson's contention that his privileges as a citizen have been abridged. The Courts of Ga. and the Legislature of Ga. have, through rulings and statute, established lawyers as a special class of citizens. Clients have been reduced to a position of "brainless" fee sources. Lawyers have been given license to breach their contracts with their clients, unless their client can get another lawyer to testify there was malpractice. Client affidavits that lawyers have breached contracts has no legal standing accord-

ing to Ga. law. Client affidavits that lawyers have breached attorneys' code of conduct have no legal standing according to Ga. law, no matter how clear and palpable breaches may be. Lawyers can submit generalized statements they have done no wrong. Client affidavits loaded with specific statements of wrongdoing supported by verifying documents is given no legal standing in Ga. courts. As a result, all lawyers in Ga. need to do to avoid liability for breach of contract and breach of duty is to refuse to testify against each other, which is exactly what happened in this case. Appellant contends those refusals amounted to a conspiratorial boycott.

The Laws and Constitutions of Ga. and the U. S. guarantee access to the courts, right to appear pro se, right to testify, due process, and equal protec-

tion of the laws. They prohibit special privileges and immunities to any class of people. In the face of these guarantees and prohibitions the State of Ga. through its Courts and its Legislature have established lawyers as a privileged class able to avoid liability for breach of contact and breach of duty, and have taken from legal clients their right to testify as to wrongdoing, and to prosecute pro se their complaints against their lawyers. It is the duty of the Supreme Court of the U. S. to rectify these wrongs, to strip from Ga. lawyers unwarranted privileges, and to restore to Patterson his constitutional rights. If the Courts and Legislature of Ga. require expert testimony in malpractice cases, then courts through rules or rulings and Legislature through statutes must see to it that expert witnesses are available. Otherwise constitutional rights of legal

clients will be abridged and lawyers as a class will enjoy special privileges and immunities not available to the average citizen.

Not only have Ga. courts and Ga. Legislature violated U. S. Constitution Amend. 5, 7 and 14 and 42 USC 1985 in respect to Appellant but have violated Ga.'s Constituion as follows:

"Legislative acts in violation of this Constitution or the Constitution of the U.S. are void, and the judiciary shall declare them." Art 1 Sec 2 Par 5

"No bill of attainer, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunity may be passed." Art 1 Sec 1 Par 10

"All citizens of the United States, resident in this state, are hereby declared citizens of this state; and it shall be the duty of the General Assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges, and immunities due to such citizenship" Art. 1, Sec. 1, Par. 7

"No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts in this

state." Art. 1, Sec. 1, Par. 12

"No person shall be deprived of life, liberty, or property except by due process of law." Art. 1, Sec. 1, Par. 1

"It is the duty of attorneys at law never to reject, for a consideration personal to themselves, the cause of the defenseless or oppressed." O.C.G.A. Sec. 15-19-4(6)

Article 1, Section 1, Par. 2 of the Ga. Constitution and Amend. 14 of the U. S. Constitution guarantees to every citizen equal protection of the laws. The State of Ga. has suspended these guarantees as between lawyers and clients generally, and as between Appellant and his lawyers in particular. Lawyers can breach contracts with clients but clients can't breach contracts with lawyers. Lawyers can testify as to conduct toward clients, but clients can't testify as to lawyers' conduct toward them. Not only has Appellant been subjected to these unconstitutional acts but he has been ordered not to file any action of any

sort against the appellees hereto without first obtaining permission of the trial court. The State of Ga. has abridged privileges of Appellant hereto and for that reason this U. S. Supreme Court should reverse decisions of the Fulton Superior Court in this action and should order that the previously dismissed malpractice actions be tried by jury.

Respectfully submitted this 22nd day of December, 1988.

James T. Patterson, Sr., Petitioner

329 Plantation Circle
Riverdale, GA 30296
(404) 996-6410

CERTIFICATION OF SERVICE

I certify I have served 3 copies of this pleading on Counsel for Defendants in the foregoing matter by depositing copies of same in properly addressed envelopes in the U.S. Mail with adequate postage affixed thereto addressed to:

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Atlanta,GA 30303

This 22nd day of December, 1988.

James T. Patterson, Sr.

Subscribed and sworn to before me this 22nd day of December, 1988.

Patricia M. Patterson
Notary Public

Notary Public, Fayette County, Georgia
My Commission Expires Sept. 23, 1991

K. APPENDIX

Fulton Superior Court Order

"James T. Patterson and Southway Theatres, Inc. vs Atlanta Bar Association, et al., No. D51247"

The Motions for Summary Judgment and for Equitable Relief as to all Defendants came on for oral hearing and after considering the entire record and all the evidence, the Court rules as follows:

1. In summary, this action is based upon two prior antitrust actions previously handled by some of the Defendants in representation of one or the other of the Plaintiffs. Patterson sought to control the strategy and conduct of the litigation which ultimately led to each counsel withdrawing from the litigation upon leave of the Court; subsequent to the withdrawal of counsel, each action was dismissed for want of prosecution because Patterson failed to obtain new counsel or to proceed pro se to prosecute actions;

Patterson individually sued each Defendants Wheeler, Flint and Lanham for breach of contract and legal malpractice; after extensive discovery in each case, the Defendants moved for summary judgment which was granted in part because Patterson did not have an expert witness to testify either by deposition or affidavit in opposition as to the standard of care or to the deviation from the standard of care; the Georgia Court of Appeals in Patterson v. Lanham, 182 Ga. App. 343, 355 S.E.2d 738 (1987) and Patterson v. Flint, 182 Ga. App. 650, 356 S.E.2d 670 (1987) affirmed the grant of summary judgment as to the Defendants Lanham, Wheeler and Flint; in the case at bar, Patterson and Southway Theatres, Inc. again assert legal malpractice against Lanham, Flint and Wheeler as well as assert that they and their attorneys in the legal malpractice actions engaged in

a conspiracy to deprive the Plaintiffs of expert testimony so as to win the summary judgment motions; the other named Defendants were either lawyers consulted by the Plaintiffs or legal associations which acted as a lawyer referral service to refer Plaintiffs to counsel or which govern the conduct of their members. Plaintiffs allege that certain Defendants failed or refused to testify for Plaintiffs because other Defendants wrongfully persuaded them not to testify; Plaintiffs contend that such conduct was tortious, violated their equal protection and due process constitutional rights, making such conduct actionable under 42 USCA 1983, constituted an illegal boycott, and that O.C.G.A. 9.11-9.1 is unconstitutional.

2. In August 1975, Southway Theatres, Inc., Patterson's corporation, commenced an antitrust action in the Northern

District of Georgia, Atlanta Division, against major motion picture distributors over their methods of distribution to it as an independent theatre; Wheeler and Flint represented Southway in this action from August of 1975 until sometime in 1983 when they withdrew by consent of the federal judge over the objection of Patterson; the motion to withdraw was pending for many months prior to its granting by the Court; counsel withdrew in part because Plaintiffs would not pay them and a fee dispute arose from attempts to revise the employment contract; Plaintiffs contended that counsel could not quit the litigation for any reason until a just resolution had been achieved; Plaintiffs did not obtain replacement counsel or proceed pro se to prosecute the action, and several months following the withdrawal by Wheeler and Flint, the federal court dismissed the action for

want of prosecution.

3. In 1985 Patterson, in his own name and not in the corporate name, sued Wheeler and Flint for breach of contract and legal malpractice in Fulton Superior Court, Case No. D23213; Wheeler and Flint obtained a grant of summary judgment for lack of standing, failure to have a legal expert witness and on the merits to have a cause of action; the judgment was affirmed on appeal so that res judicata, collateral estoppel and estoppel by judgment bars Patterson and privies, heirs or assigns from any action under such facts against Wheeler and Flint, including fraud.

4. In March of 1980 Patterson hired William C. Lanham to prosecute another suit on his behalf and for his Screen-Ad Fund against major film distributors for acts to destroy Plaintiff's national screen ad program; such litigation pro-

ceeded from March, 1980, until November of 1982 when Lanham and Virginia counsel withdrew by leave of Court; months after the withdrawal, the Court dismissed for want of prosecution where Patterson failed to proceed pro se or to obtain new counsel; on October 4, 1985 Patterson sued Lanham for breach of contract and legal malpractice in the Superior Court of Fayette County in case number 85V-284; Lanham filed a motion for summary judgment which was granted because Patterson had no legal expert witness to oppose the motion; such judgment was affirmed on appeal; thus, res judicata, collateral estoppel and estoppel by judgment bar Patterson, his privies, heirs or assigns from any action under such facts against Lanham, including fraud.

5. Plaintiff's theories of legal malpractice and breach of contract were similar in both cases; the legal mal-

practice consisted of a failure to follow Patterson's instructions or acting without Patterson's consent in the strategy, conduct or prosecution of the cases prior to trial or summary judgment, primarily in discovery matters or in terminating such representation in such fashion as to prejudice Plaintiff's rights; the breach of contracts theory also was substantially the same in both cases, which alleged that counsel could not withdraw under any circumstances until a just resolution of the case had been obtained.

6. This Court heard the Wheeler and Flint case. Most of the alleged acts of legal malpractice in the Wheeler/Flint case and the Lanham case were not a deviation from a legal duty but at most were a violation of ethical standards which does not give rise to tort liability; Tingle v. Arnold, Cate & Allen 129 Ga. App. 134(3), 199 S.E.2d 260 (1973);

Roberts v. Langdale, 185 Ga. App. 122, 123-124, S.E.2d (1987); for a deviation from the standard of care to be actionable there must be damages directly and proximately flowing from the act or omission; the alleged negligent conduct was in trial preparation and discovery and not in the trial of the case so that no damages can be shown; Rogers v. Norvell, 174 Ga. App. 453, 475(2), 336 SE2d 392 (1985); Parten v. Swan, 183 Ga App 364, 365, 358 S.E.2d 806 (1987); Whitehead v. Cuffie, 185 Ga. App. 351, 352, S.E.2d (1987); at the time of withdrawal in each case, the case was in good standing, the withdrawal was by leave of Court with sufficient time prior to such order for Plaintiffs to take such action necessary to protect their rights, and dismissal for want of prosecution came long after such withdrawal because Plaintiff Patterson neither obtained new counsel

nor prosecuted the actions pro se. Thus, damage, if any, clearly and palpably did not flow from the negligence, if any, of Lanham, Wheeler or Flint' nor have Plaintiffs established by evidence any nominal damages, flowing directly or proximately from any breach. As to the contract breach theory that counsel had to work until a just result was obtained, no lawyer can be held to a service contract where he has not been paid, when he has a personality dispute with the client which impairs his ability to represent the client or when the client fails or refuses to follow his legal advice as to trial strategy or ethical conduct, because it would be a violation of public policy as expressed by the Code of Judicial Conduct; likewise a service contract which, as in this case, lacks mutuality of obligation because the client can discharge the lawyer at any time and he is compel-

led to withdraw under the Code of Professional Responsibility; the ordinary rules of contract law and construction must be construed in light of a profession's code of ethical conduct, because to do otherwise reduces the professional to a mere technician of the law, devoid of ethical duties to the Court, the client, or society. Thus, the original actions were with out legal merit or likelihood of success and summary adjudication warranted.

7. To the extent that for the first time this action asserts an alleged cause of action by Southway Theatres, Inc. for breach of contract or for legal malpractice against Wheeler, Flint or Lanham, such action is barred by the statute of limitations; this action was filed on December 29, 1987; the breach of contract or legal malpractice action against William C. Lanham occurred in or before Nov. of 1982, more than four years prior to

the filing of this action. As to Wheeler and Flint, their alleged breach of contract or legal malpractice occurred on or before their termination of representation prior to December 29, 1987, which is more than four years since the action, if any, arose; Hamilton v. Powell, Goldstein Frazer & Murphy, 167 Ga App 411, 412(1) 414, 306 SE2d 340 (1983, aff'd 252 Ga149, 311 SE2d 818 (1984); Kilby v. Shepherd, 177 Ga. App. 462, 339 SE2d 742 (1986).

The Court finds from the clear, unambiguous, undisputed pleadings and evidence that neither Lanham nor Wheeler and Flint breached any duty in contract or tort owed to Southway Theatres, Inc.; see Patterson v. Flint, 182 Ga. App. 650, 356 S.E.2d 670 (1987); Tingle v. Arnold, Cate & Allen, 129 Ga. App. 134(3), 199 S.E.2d 260 (1973); Roberts v. Langdale, 185 Ga. App. 122, 123-124, S.E.2d (1987).

Even if there existed a breach of

duty, Plaintiff has failed to show that its damages, if any, directly and proximately flowed from such breach of duty, whether contract or tort; the underlying antitrust actions were dismissed for failure of Plaintiffs to prosecute such actions either pro se or by new counsel; such dismissals occurred long after notice of the withdrawal of counsel and by the clear, palpable and uncontradicted evidence, such dismissals were not directly and proximately caused by the conduct of Lanham, Wheeler or Flint.

8. Where an action by Plaintiffs against a lawyer is based upon litigation it must be shown by competent evidence that Plaintiffs would have prevailed in such litigation forming the basis for the action "but for" the wrongful conduct of the lawyer; thus, Plaintiffs must first try and prove that they would recover on the case within the case before the alle-

gations of negligence in the malpractice action becomes relevant and material; negligence absent causation and damages is not actionable; therefore, Plaintiffs must establish their likelihood of success in the prior action; when the case is pending in good standing subsequent to the alleged wrongful conduct and where the pretrial conduct has not been shown to have prejudiced or irreparably impaired the subsequent trial of the case, then such negligence, if any, cannot be the proxi-mate cause of the loss of such trial; there is no competent evidence that the conduct of Lanham, Wheeler or Flint caused the dismissal of the cases; see McDow v. Dixon, 138 Ga App 338, 226 SE2d 145 (1976); Jones v. Wright, 19 Ga. App 242, 244, 91 SE 265 (19); Young v. Jones, 149 Ga App 819(2), 823 256 SE2d 58 (1979); Rogers v. Norvell, 174 Ga App 453, 457(2), 336 SE2d 392 (1985); Parten

v. Swan, 183 Ga App 264, 365, 358 SE2d 806 (1987); Whitehead v. Cuffie, 185 Ga. App. 351, 352, SE2d (1987).

9. For liability to exist for professional malpractice, there must be a legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risk of harm; a breach of this standard; a legally attributable causal connection between the conduct and the resulting injury; and some loss of damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty; Bradley Center v. Wessner, 250 Ga. 199, 200, 296 S.E.2d 693 (1982); Whitehead v. Cuffie, 185 Ga. App. 351, 352, SE2d (1987). Another statement of the elements of malpractice is that there must be employment of the defendant attorney; failure of the attorney to exercise ordinary care, skill and diligence,

and that such negligence was the proximate cause of damage to the plaintiff; see Roberts v. Langdale, 185 Ga App 122, 123(1), S.E.2d (1987); Rogers v. Norvell, supra; Guilleveau v. Jenkins, 182 Ga. App. 225, 229(1), 335 S.E.2d 453 ( ).

10. Plaintiffs cannot recover in this action where they would not be entitled to recover under the former actions; if the former actions are barred, then there can be no general or special damages flowing from any alleged tortious conspiracy; no nominal damages have been proven; thus, absent a previously viable action for breach of contract or legal malpractice by one or both Plaintiffs against either Lanham, Wheeler or Flint, there can be no proximate cause or damages therefrom giving rise to liability.

For either Lanham, Wheeler or Flint to undertake to represent Plaintiffs and later to withdraw by leave of the Court

neither constitutes fraud nor gives rise to circumstantial evidence of fraud. Refusal by the other Defendants to act as Plaintiffs' expert witnesses neither constitutes misrepresentation and deceit nor a breach of contract. There is no evidence of a tortious interference with any existing contract.

11. Turning now to Defendants' defense to this action at bar, Lanham, Wheeler, Flint and their former counsel in the malpractice action deny, as to the prospective legal expert witnesses, now Defendants, that any direct or indirect act to dissuade any lawyer from acting as a legal expert on behalf of Patterson in Civil Actions D-23213 & 85V-284 occurred; no evidence has been introduced that shows any lawyer-defendant was dissuaded or discouraged from testifying for Plaintiffs by acts of Lanham, Wheeler, Flint or their counsel, showing by clear, unam-

biguous and palpable evidence that no conspiracy in fact occurred.

12. Neither the State Bar of Georgia, the Atlanta Bar Association, the Cobb County Bar Association, nor any bar association has a legal duty to provide or to procure a legal expert witness for any party; no lawyer has a legal duty to either represent or to appear as a legal expert witness in a legal malpractice action; the ethical considerations and duties to accept representation are different from retention as a legal expert witness because one relationship is that of attorney-client, while the other involves use of a lawyer's knowledge and training to testify as to standards and opinions as to conduct; a lawyer may reject employment as an expert because the action is not meritorious, the lawyer does not have time to devote to this, the time and compensation does not justify

the involvement, he feels legal malpractice actions are inappropriate or other reasons other than conspiracy which render circumstantial evidence in this regard inappropriate.

Plaintiffs contend that the legal profession has a statutory duty under O.C.G.A. 15-19-4(6) to not only represent any party seeking representation but also to act on request as an expert witness in a legal malpractice action. It is also contended that lawyers implicitly agree, acting as lawyers, to abide by the Code of Professional Responsibility and to accept such representation proffered to them and that by refusing such alleged duties; this constitutes misrepresentation and deceit to the new Plaintiffs. First, O.C.G.A 15-19-4 states ethical guidelines and considerations which do not give rise to a private cause of action; second, the duty owed is to the

Court and to the legal system as a profession and only secondarily to the client; by upholding such ethical considerations in general, individual clients, Courts and society are assured of the integrity of the profession. Such ethical cannot be employed to attack or to undermine such profession through a perverted application. The duty to serve as counsel is the duty to the Court to act in appointed criminal cases, not in civil litigation; Tingle v. Arnold, Cate & Allen, 129 Ga. App. 134, 199 S.E.2d 260 (1973); Weiner v. Fulton County, 113 Ga. App. 343, 148 S.E.2d 143 (1966).

While a lawyer may have an ethical obligation to the profession of law to represent unpopular causes that are meritorious, there exists no legal duty to do so; a lawyer cannot be unwillingly compelled to devote his time, skill, knowledge and reputation to civil causes

of action that he, in good conscience, cannot support nor can he or she be compelled in civil cases to squander credibility, reputation and future on clients that are disliked sufficiently to impair their professional judgment; Plaintiff has acted pro se for so long and in so many cases that he appears to believe he is a lawyer, which has caused him in the past to dictate discovery and trial strategy to those lawyers who sought to represent him because the alleged acts of malpractice, in almost every case, come down to a conflict between Plaintiff and the lawyer over how to represent him; in the end, the lawyer withdraws over objections of Plaintiff who seeks to rule the lawyer; with such dilemma, the lawyer in each event withdrew rather than continue in a conflict with the client long prior to trial to avoid harm to the client's case; it

remains curious that, in light of the many pro se actions by Patterson, he seems to have taken no steps to protect himself by proceeding on his own to prosecute the cases that he sought to control but instead allowed, by inaction, the cases to be dismissed for want of prosecution; Patterson has turned from his former crusades against the Troup County Board of Education or the alleged antitrust violations of national motion picture distributors to undertake an attack against lawyers in general, the organized bar and the bench, attempting to use their ethical standards as a net within which to snare them; however, the violation of ethical standards, if such in fact existed, does not rise to a tort because a tort must be based upon the breach of some legal duty as opposed to some aspirational ideal of conduct.

13. Lawyers have a duty to dissuade

meritless or frivolous litigation from clogging precious judicial resources; the General Assembly, through O.C.G.A. 9-15-14, has stated the public policy to deter frivolous or abusive litigation; common law, prior to the adoption of either State or federal constitution, excluded frivolous litigation through issue pleadings and other procedural devices and established the common law doctrine recognized in the constitutions that a party had no unfettered right to litigate anything which he wanted to litigate by requiring standing, justicable case or controversy, and forms of action; the constitutional right to due process accepted the doctrines of res judicata, collateral estoppel, and estoppel by judgment as constitutional and legitimate means to bring finality in litigation consistent with traditional notions of fair play and substantial justice when a competent

court with jurisdiction over the person has rendered judgment; concept of full faith and credit afforded by the constitution is based upon such doctrine of finality by prior judgment from actions in sister states; a court has an inherent right and power to protect its jurisdiction, administration and process from misuse or abuse; a lawyer, without good cause, who flaunts doctrines of finality or pursues or encourages frivolous litigation risks contempt action by the court or disciplinary action by the unified State Bar of Georgia; thus, a lawyer has a right to reject what he believes to be a meritless litigation but also a duty to do so; if the lawyer may reject such representation then he may likewise decline for the same reasons and as a matter of duty the role of a legal expert in a case that he believes to be without merit; thus none of the Defendants approached as

legal expert witnesses nor the associations contacted for referral owed Plaintiffs any duty to testify,.

14. Under the tort laws of Georgia, conspiracy alone is not actionable but must be in conjunction with conduct which amounts to a tort; there has been no evidence of such breach of duty owed to Plaintiffs; while a boycott may be wrongful and constitute the underlying conduct for a conspiracy to be tortious, there exists no evidence of an unlawful boycott; while Plaintiffs have been unsuccessful in obtaining a legal expert, they have blamed this, without direct evidence on a conspiracy to boycott, reasoning by circumstantial evidence of its existence; as has been previously pointed out, the lack of merit of this case alone offers a reasonable explanation which defeats any circumstantial evidence of a boycott conspiracy; absent direct evidence of a

boycott by Defendants, then such theory must likewise fail.

Legal representation is a personal service contract which requires an offer, acceptance and consideration. There is no evidence that any lawyer consulted entered into a binding contract, only that they talked to Plaintiff and declined expert employment. Plaintiffs never paid any lawyer to serve as an expert witness. Absent any contract with an expert there can be no tortious conspiracy to interfere with a contract, and if any communication negative to Plaintiffs occurred, it would not be actuibab actionable.

15. Arguendo, even if a conspiracy could be proven that was intended to deter and to prevent certain Defendants from testifying and appearing as a legal expert for the Plaintiffs, such conduct would not be actionable as a tort even though it might violate the Code of

Professional Conduct; violation of the Code of Professional Conduct is not malpractice; Tingle v. Arnold, Cate & Allen, 129 Ga. App. 134(3), 199 S.E.2d 260 (1973); Roberts v. Langdale, 185 Ga. App. 122, 123-124, SE2d (1987); deterring an expert witness who is not a factual witness would be analogous to destruction, damage, or alteration of evidence; spoilation of evidence, if any occurred, does not give rise to a tort action in Georgia no matter now reprehensible; Gardner v. Blackston, 185 Ga. App. 754(1), S.E.2d (1988).

16. Plaintiffs have sought to assert a civil rights action under 43 USCA 1983, et seq; the individual Defendants acted individually and not either under color of law or as governmental actors to subject them to such statutes; the Atlanta Bar Association and the Cobb Bar Association are not-for-profit corporations and

have no governmental function and did not act under color of law; the State Bar of Georgia is a creature of the judicial branch of the State of Georgia and was created by the order of the Supreme Court of Georgia acting through delegated authority of the State; there exists no evidence that the State Bar acted in concert or in conspiracy to deprive Plaintiffs of any constitutional rights, State or federal, for equal protection or due process; the State Bar acted only to refer potential clients under a lawyer referral service; there is no evidence that any individual, legal entity or association directly or indirectly violated any rights of Plaintiffs to due process and equal protection under State or federal constitutions. As a governmental entity of the State, absent proof of a waiver of sovereign immunity, the State Bar of Georgia enjoys immunity from tort liability.

There has been no evidence to show a waiver of sovereign immunity.

17. From the evidence before the Court, it finds that there has been no act or omission to act which would give rise to a constitutional rights to equal protection or due process under the federal constitution by any Defendant.

18. In bringing this action, if and to the extent that this action constitutes, in whole or in part, within the ambit of O.C.G.A. 9-11-9.1 "any action for damages alleging professional malpractice," then Plaintiffs have failed and refused to attach the requisite affidavit of a legal expert. Plaintiffs attach the constitutionality of said act under both the state and federal constitutions on equal protection and due process grounds. Analyzing this act, the Court finds a rational legislative basis for the two classes of parties.

The General Assembly of Georgia has applied this act equally to plaintiffs and to professional defendants in all professional malpractice actions seeking damages. The rational legislative purpose behind the act was to exclude professional malpractice actions for money damages from litigation unless and until the plaintiff could demonstrate a prima facie case by the attachment of an affidavit; such purpose was to exclude time-consuming, wasteful, complex and costly litigation unless these actions could go to a jury; in the past, many professional malpractice actions received summary adjudication through summary judgment or directed verdict because the plaintiff lacked expert testimony to establish the standard of care and a deviation from the standard of care, essential aspects of such actions because lay persons cannot testify regarding such professions. The

General Assembly wished to preserve finite judicial resources for criminal and domestic cases and other types of civil cases which had higher likelihood of success. The General Assembly also sought to reduce the rising cost of professional liability insurance by excluding cases which could not get to a jury; such impact or effect is tailored to the legitimate purposes and is not overly broad because it does not bar professional malpractice actions but delays the filing until plaintiffs have an expert witness; absent an expert witness the action would end with summary adjudication; such restriction is not an unreasonable burden but merely imposes a condition precedent to filing. Such requirement does not offend traditional notions of fair play and substantial justice; the restraint is reasonable as to time, is clear and unambiguous and is not an unreasonable limitation.

19. Under O.C.G.A. 9-11-9.1(a), failure to file an affidavit from an appropriate expert deprives the Court of subject matter jurisdiction and constitutes an abatement of the action until such condition precedent has been satisfied; such failure to attach the affidavit cannot raise defenses on the merits otherwise it would give rise to a substantive as opposed to a procedural change which cannot be applied retroactively without becoming an ex post facto act; an action on the merits would give rise to constitutional issues of being too restrictive for the purpose intended to be achieved.

20. The Court finds that O.C.G.A. 9-11-9.1 does not violate either federal or State constitutional rights under the equal protection or due process clauses for the reasons previously set forth herein.

21. Patterson has litigated many of these same issues in United States District

Court for the Northern District of Ga.; Case C78-2060A ended in a verdict against Patterson; C81-618A was a related case to the foregoing which ended in summary judgment against Patterson; C80-445A was dismissed for want of prosecution against Patterson; and C85-3501A was dismissed against Patterson with sanctions and was affirmed in Patterson v. Akin, No. 87-8299 Sl. p Op at 3 (11th Cir., March 28, 1988); the former cases raised the issues regarding the antitrust action and the unmeritorious nature of such actions; No. C-85-3501A raised most of the same issues as to the legal mal-practice actions and conspiracy in the case at bar.

22. Plaintiffs failed to set forth or to show evidence to support the fraud allegations, nor any action for misrepresentation and deceit.

23. The Court grants summary judgment to each and every Defendant under all counts

and under all theories of liability.

24. It appears to the Court that James T. Patterson has a long history of abusive, harassing and frivolous litigation in the United States District Court for the Northern District of Ga. he sought to relitigate in Patterson v. Troup County Board of Education, Civil Action No. C-77-6N (N.D.Ga.,Aug 26, 1977) aff'd per curiam No. 77-3097 (5th Cir., April 17, 1978); Patterson v. Schacht, Civil Action No. C78-31 N; Patterson v. Abernathy, Civil Action No. C78-47 N, and Patterson v. Schacht, et al, Civil Action C79-106 N, until the Court restrained and enjoyed him from such further repeated litigation.

25. In the case at bar, the basic action, the resulting malpractice actions, the conspiracy actions, have been repeatedly tried in both federal and state trial and appellate court, unsuccessfully by Plaintiffs, this action without such prior his

tory, is patently frivolous, abusive, and without basis in law or fact; as the underlying action gained momentum through successive levels of litigation, it has sucked in as defendants trial judges, former counsel for Patterson counsel for lawyers Patterson sued counsel Patterson contacted, counsel whom Patterson merely suspected of conspiracy and bar associations that provided referral services; pro se litigation is always difficult; since the party is not subject to the Code of Professional Conduct and does not balance duties between the Court, client and public; all litigation must come to an end at some point in time; Plaintiffs have had ample opportunity to litigate and have had an adjudication on the merits.

26. In the Court's inherent power to protect its jurisdiction, administration and decorum from patently frivolous, oppressive, harassing, vexatious and merit-

less litigation and in exercise of its equity powers where there are a multiplicity of suits, inadequate remedy at law, repeated wrongful conduct and irreparable harm as in this case, this Court enters the following order:

WHEREFORE, it is hereby permanently decreed, ordered and adjudged that from this date forward James T. Patterson or the officers, directors, stockholders, assigns or others acting in concert with any corporation in which Patterson now or formerly owned stock shall not file or cause to be filed in any court within the judicial system of the State of Georgia or in any federal court, any complaint, petition, motion or otherwise bring a claim for relief of any kind in law or in equity against this court, any opposite party in this action, the opposite parties' employees, agents or relatives or present or former counsel for such

parties; such limitation also extend to any former parties as well, whether dismissed with or without prejudice, without first obtaining leave of this Court to do so.

PROVIDED FURTHER, however, this Order does not in any way affect the rights of the parties to continue to litigate any claim which is currently pending in an action which is also currently pending as of this date in a court within the judicial system of the State of Georgia, but does affect the rights of the parties to file or litigate any action in federal court since said court has in Civil Actions C78-2060A, C81-618A, and C80-445A, reached final adjudication and Civil Action C85-618A has found a lack of federal jurisdiction and that said action was frivolous;

WHEREFORE, from prior conduct, it appears that Patterson may not cease to

file such vexatious and abusive litigation, may ignore or seek to circumvent this Order, the Court hereby relieves from answering, making discovery or otherwise responding to this action or motions or to any action related or appertaining to the subject matter of this action any former or present party, their counsel or any new party defendant. These parties will be required to answer or respond only after they have received notice from this Court that this Order has been modified and that they are directed to so respond.

WHEREFORE, the Clerk of this Court is directed not to file any actions, accept any motions or other pleadings from James T. Patterson which is any way relate or appertain to the subject matter of this action without first receiving an order from this Court directing that such may be filed.

WHEREFORE, the Court exempts from such restriction a timely filed appeal to the appropriate court from this order; no notice of appeal shall act as a supercedeas and this Order shall remain in full force and effect pending any appeal.

27. The Court finds that there exists no just reason why this judgment should not be entered immediately and made the judgment of this Court; the Court expressly orders and directs the clerk to immediately enter this judgment upon the dockets of this Court.

SO ORDERED this 24 day of June, 1988.

"Frank M. Eldridge, Judge
Fulton Superior Court
Atlanta Judicial Circuit"

IN THE SUPREME COURT OF GEORGIA

Decided Oct. 26, 1988-46158-PER CURIAM.

PATTERSON V. ATLANTA BAR ASSOCIATION

Judgment affirmed without opinion pursuant to Rule 59. All the Justices concur.